Supreme Court, U.S.
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No. 93-1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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REPLY BRIEF OF PETITIONER

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8 pp

TABLE OF AUTHORITIES

CASES — Page

Allegheny Pittsburgh Coal Co. v. *County Comm'n*, 488 U.S. 336 (1989) 3
BFP v. *Resolution Trust Corp.*, 114 S. Ct. 1757 (1994) 5
Department of Rev. v. *ACF Indus., Inc.*, 114 S. Ct. 843 (1994) 5
Kennecott Corp. v. *Utah State Tax Comm'n*, 858 P.2d 1381 (Utah 1993) 4
Nordlinger v. *Hahn*, 112 S. Ct. 2326 (1992) 3
Northern Natural Gas Co. v. *State Bd. of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990) 4

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In the petition for a writ of certiorari, petitioners demonstrated that the Kansas property taxation practice of intentionally and systematically treating certain railroads more favorably than the other members of the same state law property subclass (1) violates the Equal Protection Clause of the Fourteenth Amendment, (2) conflicts with decisions of the Nebraska Supreme Court and this Court, and (3) is inconsistent with the most elementary principles of preemption. Respondent's brief in opposition —which openly concedes that Kansas intentionally discriminates between members of the same state-defined property class—merely reinforces the clear need for this Court's review of the decision below.

1. Respondent manifestly mischaracterizes the relief sought by petitioners. Petitioners make no claim that they come within the scope of the 4-R Act. Opp. 5. Instead, petitioners seek to be treated in a uniform and equal manner as provided for by the Kansas Constitution. The Kansas Constitution requires uniform assessment among members of the same subclass and also requires a uniform and equal basis of valuation for all property subject to taxation. Pet. App. 36a-37a. The administrative choice to treat certain railroads differently from pipelines, which violates state law, is prohibited by the Equal Protection Clause of the Fourteenth Amendment. Accordingly, this Court, and not Congress, is the appropriate forum for petitioners' request that the violations of their constitutional rights be redressed.

2. Respondent concedes that "pipelines are state assessed public utilities, as are railroads," and that "Kansas has classified property for property tax purposes, placing pipelines and railroads in the public utility subclass." *Id.* at 2. In addition, respondent recognizes that the Kansas constitution "requires uniform and equal tax treatment within constitutionally prescribed subclasses." *Id.* at 8; See also Pet. App. 19a (the Kansas Constitution "treats all public utility property alike"). Thus, Kansas' unambiguous legislative policy of mandating uniform treatment of railroads and pipelines could not be clearer and is uncontested by respondent, and these concessions are fatal to respondent's arguments. Having determined that railroads and pipelines are similarly situated for purposes of property taxation, Kansas is bound by the federal equal protection requirement to tax them uniformly.

Respondent does not even try to construct a rational basis for its discrimination, relying instead on the supposed compulsion of the 4-R Act. See Opp. 10 n.11; but see *infra* p. 5. But it was *Kansas*, and not the 4-R Act, that determined that railroads and pipelines are similarly situated. The 4-R Act only requires that states not

assess or tax railroad property at rates higher than those applied to commercial and industrial property. See Pet. App. 34a-35a.

Respondent also ignores that the special treatment afforded by state taxing officials to certain public utilities was not even extended to all *railroads*. See Pet. 5. Thus, respondent not only violated the equal protection rights of petitioners, but also the rights of numerous railroads. See *id.* at 10-11.[1]

Respondent's argument that the pipelines were assessed at the percentage of value provided by state law completely misses the point. See Opp. 2-3. Petitioners' complaint is the same as the taxpayer in *Allegheny Pittsburgh*. And there, this Court made it perfectly clear that the " 'intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.' " *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 345 (1989) (quoting *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 352-53 (1918)). Therefore, the Equal Protection Clause is violated when the state subjects a taxpayer to taxes " 'not imposed on others of the same class' " through the deliberate actions of state taxing officials in contravention of the state's declared public policy. *Id.* (quoting *Hillsborough* v. *Crombell*, 326 U.S. 620, 623 (1946)); *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2334-35 (1992).[2]

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[1] Nor was this favorable treatment "ordered" by the Kansas district court as respondent rationalizes. Opp. 3. Favorable tax treatment was voluntarily given to those railroads that brought suit against respondent. *Id.* at 2.

[2] The fact that *Allegheny* and the other decisions of this Court establishing the principles by which state taxation schemes are governed under the Equal Protection Clause do not specifically address the 4-R Act hardly makes those decisions inapplicable to the present case. *See* Opp. 11. Without the 4-R Act the proper course would be summary reversal. Because of the 4-R Act, the

3. Respondent further concedes that the decision of the Nebraska Supreme Court in *Northern Natural Gas Co.* v. *State Board of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990), directly conflicts with the result reached by the court below. Opp. 7 ("it is true that the Nebraska Supreme Court required pipeline property to be equalized with railroad property"). Nevertheless, respondent argues that the result in the Nebraska decision was justified because, "regardless of the ramifications of the 4-R Act," the state was required to give railroads and pipelines equal treatment. *Id. But the same is true in Kansas.* The Kansas Constitution provides for "a uniform and equal basis of valuation . . . of *all* property." Pet. App. 36a (emphasis added). By granting personal property deductions to certain railroads, Kansas taxing officials have violated the state law command that there be a uniform basis of valuation which applies regardless of property classifications. In addition, as noted above, respondent concedes that the Kansas legislature classified railroads and pipelines together in the same property subclass and made it a matter of state policy to assess railroads and pipelines uniformly. Thus, there simply is no "contrast" (*id.* at 8) between the tax treatment prescribed by state law for railroads and pipelines in Kansas and Nebraska.[3] The decisions directly conflict.

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issue warrants plenary review to resolve the conflict with the Nebraska Supreme Court.

[3] Respondent's allegation that the Utah Supreme Court has rejected an argument similar to petitioners' (Opp. 10) is manifestly unfounded. In *Kennecott Corp.* v. *Utah State Tax Commission*, 858 P.2d 1381, 1388 (Utah 1993), the court unremarkably found that the mining business seeking uniform treatment with the railroads was not in the same property class and was not "similarly situated" to railroads. The "sole basis" for the mining company's claim was that both sets of taxpayers were centrally assessed. *Id.* The court agreed there was no other similarity between the two taxpayers. *Id.*

4. The 4-R Act simply does not preempt state law property classifications. See Pet. 16-17. There is no inconsistency between the state's obligations under the 4-R Act (nondiscrimination against railroads) and the state constitution (uniform treatment of railroads and pipelines). See Pet. 17. The Court's decisions in *Department of Revenue* v. *ACF Industries, Inc.*, 114 S. Ct. 843, 846 (1994), and *BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757 (1994), make it clear that the 4-R Act is not to be given the expansive preemptive scope accorded it by the Kansas Supreme Court and respondent. See Pet. 18-19. Accordingly, it is respondent who seeks through extensive and unwarranted preemption of state law classifications to "further disrupt[]" (Opp. 13) the state's unambiguous tax policy of uniform treatment so that it can excuse the favorable—albeit unlawful—treatment its taxing officials afforded to certain railroads.

5. Finally, respondent does not deny that this case raises issues of immense national importance or that it has profound economic significance for open-access common carriers as well as energy consumers nationwide. Indeed, because of respondent's refusal to consent, several *amici curiae* have moved for leave to file briefs in support of the petition and have noted the wide-spread nature of the tax discrimination at issue in this case. See, *e.g.*, Proposed Brief *Amicus Curiae* of Interstate Natural Gas Ass'n of America, at 8 n.5 (noting additional states engaging in discriminatory tax treatment).

* * * *

Because the decision of the court below upheld the actions of respondent depriving petitioners of equal protection under Kansas law in direct conflict with the decision of the Nebraska Supreme Court and this Court's decisions, certiorari should be granted.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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